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No. 83-883

In the Supreme Court of the United States

OCTOBER TERM, 1983

GEORGE MISKOVSKY,
Petitioner,

vs.

WORLD PUBLISHING COMPANY and
NEWSPAPER PRINTING CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Oklahoma

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

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December, 1983

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TABLE OF CONTENTS

	PAGE
OPINIONS AND ORDER BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
FEDERAL QUESTIONS	2
STATEMENT OF THE CASE	3
REASONS FOR NOT GRANTING THE WRIT	5
I. The Opinion of the Oklahoma Supreme Court was based on adequate and independent state grounds	7
II. Petitioner's first and second asserted Federal questions were not timely raised in the Oklahoma courts	8
III. Petitioner's third asserted Federal question was not passed upon by the Oklahoma courts	10
CONCLUSION	11
APPENDIX "A"—Petition-in-Error in the Supreme Court of Oklahoma filed June 24, 1980 (No. 55,431)	
APPENDIX "B"—Petition for Rehearing in the Supreme Court of Oklahoma filed June 30, 1983 (No. 55,431)	

TABLE OF AUTHORITIES

Cases	PAGE(S)
Akins v. *Altus Newspapers, Inc.*, 609 P.2d 1263 (Okla. 1977), *cert. denied*, 449 U.S. 1010 (1980)	4-5
Bailey v. *Anderson*, 326 U.S. 203 (1945)	10
Black v. *Cutter Laboratories*, 351 U.S. 292 (1956)	7, 8
Cardinale v. *Louisiana*, 394 U.S. 437 (1969)	8, 9
Cox Broadcasting v. *Cohn*, 420 U.S. 469 (1975)	9
Durley v. *Mayo*, 351 U.S. 277 (1956)	7
Fite v. *Oklahoma Pub. Co.*, 146 Okla. 150, 293 P. 1073 (1930)	4
Gertz v. *Robert Welch, Inc.*, 418 U.S. 323 (1974)	7
Hanson v. *Denckla*, 357 U.S. 235 (1958)	9
Haynes v. *Alverno Heights Hospital*, 515 P.2d 568 (Okla. 1973)	5
Herb v. *Pitcarin*, 324 U.S. 117 (1944)	7
Kee v. *Armstrong, Byrd & Co.*, 75 Okla. 84, 182 P. 494 (1919)	5
McKenny v. *Carpenter*, 42 Okla. 410, 141 P. 779 (1914)	5
Michigan v. *Long*, ___ U.S. ___, 103 S.Ct. 3469 (1983)	7
Miskovsky v. *Oklahoma Pub. Co.*, 654 P.2d 587 (Okla. 1982)	4
New York Times v. *Sullivan* 376 U.S. 254 (1964)	5
New York Times Company v. *Jascalevich*, 439 U.S. 1317 (1978)	7
Oklahoma Pub. Co. v. *Kendall*, 96 Okla. 194, 221 P. 762 (1923)	5
Phoenix Printing Co. v. *Robertson*, 80 Okla. 191, 195 P. 487 (1921)	5
Radio Station WOW v. *Johnson*, 326 U.S. 120 (1945)	9
Street v. *New York*, 394 U.S. 576 (1969)	9, 10

AUTHORITIES CONTINUED — PAGE(S)

Thompon v. *Newspaper Printing Corporation*, 325 P.2d 945 (Okla. 1958) 5

Webb v. *Webb*, 451 U.S. 493 (1981) 8, 9, 10

Winters v. *Morgan*, 576 P.2d 1152 (Okla. 1978) 5

Statutes and Codes

12 Okla. Stat. § 1441 (1981) 2

15 U.S.C. § 1801, *et seq.* 4

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In the
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OCTOBER TERM, 1983

GEORGE MISKOVSKY,
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vs.

WORLD PUBLISHING COMPANY and
NEWSPAPER PRINTING CORPORATION,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

Respondents, World Publishing Company and Newspaper Printing Corporation, respectfully submit that a Writ of Certiorari should not issue to review the Opinion and Judgment of the Supreme Court of the State of Oklahoma entered on June 21, 1983.

OPINIONS AND ORDER BELOW

The Opinion of the Supreme Court of the State of Oklahoma in this case is set forth in Appendix A, pages 1a, *et seq.*, to the Petition for Writ of Certiorari. In that Opinion the court adopted its Opinion decided and filed the same date in *Miskovsky* v. *Tulsa Tribune Company and Newspaper Printing Corporation* as being the law of the case and that Opinion is set forth in Appendix B, pages 3a, *et seq.*, to the Petition. The Order denying Rehearing is set forth in Appendix C, pages 18a, *et seq.*, to the Petition.

JURISDICTION

The jurisdiction of this Court is sought to be invoked under 28 U.S.C. § 1257(3) to review an Opinion of the Supreme Court of the State of Oklahoma rendered on June 21, 1983. Petitioner's Petition for Rehearing was denied on October 12, 1983.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. No Constitutional provisions are involved in the Opinion sought to be reviewed.

2. 12 Okla. Stat. § 1441 (1981).

FEDERAL QUESTIONS

Petitioner identifies three federal questions which he seeks to raise.

The first and second overlap. Therein, Petitioner asserts that the United States Constitution does not supplant state defamation law on the issues of defamatory meaning, defamatory statements of opinion or burden of proof.

In the third, Petitioner asserts that the First and Fourteenth Amendments prohibit a rule of law which grants virtual absolute immunity to a media defendant for libel suits brought by a public figure.

STATEMENT OF THE CASE

While Petitioner's Statement of the Case errs in a number of respects, the only factual matters requiring correction is the statement that "Respondents are privately held media corporations controlled by the Jones family" and the implication in Petitioner's argument that Respondents are a multi-media conglomerate. Both the statement and the implication are incorrect. Respondents are World Publishing Company, which publishes the Tulsa World newspaper, and Newspaper Printing Corporation, which is World Publishing Company's agent for printing and distribution. World Publishing Company and Tulsa Tribune Company are separately owned and controlled corporations, publishing respectively the Tulsa World newspaper and the Tulsa Tribune newspaper.[1] Respondent, World Publishing Company, publishes a morning and Sunday newspaper and the Tulsa Tribune Company publishes an evening newspaper. Newspaper Printing Corporation is an operating and distributing company jointly owned by World Publishing

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[1] *Miskovsky* v. *Tulsa Tribune Company and Newspaper Printing Corporation* is also pending before this Court on a Petition for Writ of Certiorari, No. 83-882, involving newspaper publications arising out of the same subject matter, Petitioner's questioning of then Senatorial candidate David Boren's sexual preferences. In response to Petitioner's questioning of Senator Boren, the Tulsa World Newspaper published six items, five news articles and one editorial which were the publications sued upon and brought before this Court in this case. See Appendices E through J, pages 33a-49a, to the Petition for Writ of Certiorari. The Tulsa Tribune Company published six articles and three editorial cartoons. While the basic subject of the news event was the same, the publications by the Tulsa World and the Tulsa Tribune newspapers differ in many respects as may be noted by a comparison of the items.

Company and Tulsa Tribune Company under the auspices of the Newspaper Preservation Act, 15 U.S.C. § 1801 *et seq.* (1970).

On June 21, 1983, the Oklahoma Supreme Court filed an Opinion affirming the Order of the trial court sustaining a Demurrer to the Petition and determining that the Petition's defects were not amendable.[2]

The Oklahoma Supreme Court determined that the "tenor and import" of the publications in question and the issues presented on appeal were the same as those in *Miskovsky* v. *Tulsa Tribune Company and Newspaper Printing Corporation,* decided by it on the same date and which is now pending before this Court on a Petition for a Writ of Certiorari, No. 83-882. The Oklahoma Supreme Court adopted what was said in *Miskovsky* v. *Tulsa Tribune* as the law in the case.

In *Miskovsky* v. *Tulsa Tribune,* the Oklahoma Supreme Court applied the Oklahoma law of libel per se and libel per quod in analyzing the publications and in holding that they were not defamatory. In doing so, the Oklahoma Supreme Court cites, discusses and relies upon numerous Oklahoma cases including the following: *Miskovsky* v. *Oklahoma Pub. Co.,* 654 P.2d 587 (Okla. 1982); *Fite* v. *Oklahoma Pub. Co.,* 146 Okla. 150, 293 P. 1073 (1930); *Akins* v. *Altus*

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[2] As is apparent from Appendix D to the Petition for a Writ of Certiorari to this Court, the Oklahoma Supreme Court affirmed the trial court's Order sustaining a Demurrer to the First Amended Petition in the trial court and not the original Petition as is stated in the Oklahoma Supreme Court Opinion. That error is not material as the First Amended Petition contained the same allegations as the original Petition adding only allegations of special damages.

Newspapers, Inc., 609 P.2d 1263 (Okla. 1977), *cert. denied*, 449 U.S. 1010 (1980); *Winters* v. *Morgan*, 576 P.2d 1152 (Okla. 1978); *Thompson* v. *Newspaper Printing Corporation*, 325 P.2d 945 (Okla. 1958); *McKenny* v. *Carpenter*, 42 Okla. 410, 141 P. 779 (1914); *Haynes* v. *Alverno Heights Hospital*, 515 P.2d 568 (Okla. 1973); *Kee* v. *Armstrong, Byrd & Co.*, 75 Okla. 84, 182 P. 494 (1919); *Oklahoma Pub. Co.* v. *Kendall*, 96 Okla. 194, 221 P. 762 (1923); and *Phoenix Printing Co.* v. *Robertson*, 80 Okla. 191, 195 P. 487 (1921).

In finding the publications non-defamatory, the Oklahoma Court also relied on the Oklahoma statutory definition of libel, 12 Okla. Stat. § 1441 (1981), and quoted extensively from two Oklahoma cases, *Kee* v. *Armstrong, Byrd & Co., supra*, and *Fite* v. *Oklahoma Pub. Co., supra.*

REASONS FOR NOT GRANTING THE WRIT

The Oklahoma Supreme Court did not decide this case on any of the asserted federal questions raised in the Petition for Writ of Certiorari, nor were any of them involved in this case.

Petitioner argues that the Oklahoma Supreme Court erroneously concluded that under *New York Times* v. *Sullivan*, 376 U.S. 254 (1964) and its progeny, the Oklahoma law of libel had been supplanted by federal constitutional law and that the court incorrectly believed that state law on the issues of defamatory meaning, opinion and burden of proof have been superseded and controlled by the requirements of the Constitution. But a fair reading of the Opinion in this case makes it crystal clear that the Oklahoma Supreme Court was applying the Oklahoma law of

libel per se and libel per quod in analyzing the publications and in holding that they were not defamatory.

Petitioner also asserts that the Supreme Court of Oklahoma has shifted the burden of proof under the belief that the Constitution requires a public figure plaintiff to prove falsity. But burden of proof is not involved in this case. Here there was deficiency of allegations, not a deficiency of proof. Despite general allegations to the contrary, the publications were found to be non-defamatory. Speaking of the publications, the Oklahoma Supreme Court noted that "The factual data therein set forth as facts are true as is alleged in the allegations in plaintiff's petition". Appendix B, page 11a to the Petition.

Petitioner further asserts that the Oklahoma Supreme Court's Opinion in this case effectively grants virtual absolute immunity to the media from libel suits brought by a candidate for public office in violation of the First and Fourteenth Amendments. But, this contention ignores the fact that the Oklahoma Supreme Court carefully analyzed each of the allegedly libelous publications and found them to be non-defamatory under recognized and existing libel law. It does not extend immunity from libel suits to media defendants.

I

The Opinion of the Oklahoma Supreme Court was based on adequate and independent state grounds.

It has been a long standing principle that this Court will not review judgments of state courts that are based on adequate and independent state grounds. *Herb* v. *Pitcairn*, 324 U.S. 117, 125, 128 (1944); *New York Times Company* v. *Jascalevich*, 439 U.S. 1317, 1325 (1978); *Michigan* v. *Long*, ___ U.S. ___, 103 S.Ct. 3469 (1983).

If the state court decision indicates that it is based on adequate state grounds, or if federal precedents are noted in the decision, but there appears a bona fide, separate adequate and independent state ground, this Court will not undertake a review of those questions. *Michigan* v. *Long*, 103 S.Ct. at 3476. Petitioner further has the burden of estblishing the jurisdiction of this Court. *Durley* v. *Mayo*, 351 U.S. 277, 281 (1956).

Further, in cases where broad language is used in a state court decision, the Court should not pass on the federal question mentioned in the state court Opinion "where it appears that the judgment rests on adequate state grounds". *Black* v. *Cutter Laboratories*, 351 U.S. 292, 297-98 (1956).

Although the Oklahoma Supreme Court did quote from *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974), a statement on opinions, it is obvious from a fair reading of the Opinion that the Oklahoma Supreme Court did not base its decision on that statement, nor was such necessary to the decision reached, but the Opinion determined the publications to be non-defamatory under numerous decisions

of the Oklahoma Supreme Court which formed adequate state grounds for affirming the trial court. As noted in *Black* v. *Cutter Laboratories*, 351 U.S. at 297, "This Court, however, reviews judgments, not statements in opinions."

With this in mind, from a fair reading of the Opinion of the Supreme Court of Oklahoma, it is clear that this decision was based not on the federal questions sought to be reviewed, but upon the completely adequate state grounds that the publications in question were not defamatory under a long line of Oklahoma decisions dealing with the interpretation of allegedly defamatory publications. As such, this Court lacks jurisdiction to review the issues presented.

II

Petitioner's first and second asserted federal questions were not timely raised in the Oklahoma courts.

The first two federal questions sought to be raised by Petitioner were raised for the first time in the Petition for Rehearing before the Oklahoma Supreme Court.

Petitioner did not raise any issue concerning alleged defamatory opinions or the asserted supplantation of state defamation law by the United States Constitution in his Brief-in-Chief or Petition-in-Error to the Oklahoma Supreme Court. Appendix A to this Brief.

Before a state court decision can be reviewed in this Court on a claimed impingement of the United States Constitution, the federal claim must have been raised, presented to, and passed upon by the highest state court. *Webb* v. *Webb*, 451 U.S. 493, 495 (1981); *Cardinale* v. *Louisiana*, 394 U.S. 437, 438 (1969).

The properly raised federal question determination is a two-fold requirement. The federal question must have been properly raised by the Petitioner in a timely fashion. *Cardinale* v. *Louisiana, supra*; *Hanson* v. *Denckla*, 357 U.S. 235, 243 (1958). And the state court must be "afforded a fair opportunity to address the federal question that is sought to be presented. . . .," *Webb* v. *Webb*, 451 U.S. at 501, or the issue must have been "necessarily decided" 'by the state court when it affirmed the trial court. *Street* v. *New York*, 394 U.S. 576, 582 (1969).

Federal claims are not seasonably presented when such issues are raised for the first time in a petition or motion for rehearing before the state court. *Hanson* v. *Denckla, supra; Radio Station WOW* v. *Johnson*, 326 U.S. 120, 128 (1945). The only exception to this timely raised limitation is where the state court exerted its jurisdiction and actually dealt with the federal question raised first in the motion for rehearing as if the question were properly raised in a timely fashion. *Cox Broadcasting* v. *Cohn*, 420 U.S. 469, 476 (1975); *Radio Station WOW* v. *Johnson*, 326 U.S. at 128. That, however, is not present in this case as the Oklahoma Supreme Court denied rehearing without an opinion. Appendix B to this Brief and Appendix C to the Petition.

Accordingly, the issues regarding opinions and the supplantation of state defamation law by Constitutional provisions were not timely raised in the Oklahoma courts and this Court is without jurisdiction to review those issues.

III

Petitioner's third asserted federal question was not passed upon by the Oklahoma courts.

The alleged absolute immunity from libel of media defendants was not passed upon by or a part of the decision of the Oklahoma Supreme Court. For the issue to be a properly raised federal question, the Oklahoma Supreme Court must have actually decided the issue presented to this Court or must have necessarily dealt with such issue. *Webb* v. *Webb*, 451 U.S. at 501; *Street* v. *New York*, 394 U.S. at 582; *Bailey* v. *Anderson*, 326 U.S. 203, 206 (1945).

Although Petitioner in an indirect fashion raised the absolute immunity question in his Brief-in-Chief to the Oklahoma Supreme Court, the decision of the Oklahoma Supreme Court did not in any way pass upon, consider or base its decision on an absolute immunity question. In *Webb* v. *Webb*, 451 U.S. at 501, this Court stated:

> "At the minimum, however, there should be no doubt from the record that a claim under federal statute or the Federal Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by the state law. Otherwise, we cannot be sufficiently sure, when the state court whose judgment is being reviewed has not addressed the federal question that is later presented here, that the issue was actually presented and silently resolved by the state court against the petitioner or the appellant in this Court."

Petitioner's third asserted federal question regarding alleged absolute immunity for media defendants, even if

properly raised, was not addressed or decided in the Oklahoma Supreme Court and thus, jurisdiction is not present to review this issue.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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December, 1983

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CERTIFICATE OF SERVICE

I, Edwin S. Hurst, a member of the Bar of the Supreme Court of the United States and counsel of record for the Respondents, hereby certify that, pursuant to the Rules of the Supreme Court, three (3) copies of the foregoing Brief in Opposition were served on the following parties:

Everett J. Sweeney
Counsel of Record
E. Joe Lankford
303 South Peters
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by depositing said copies in the United States Mail, properly addressed and postage fully prepaid, this _____ day of December, 1983.

All parties required to be served have been served.

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APPENDICES

APPENDIX A

[Filed June 24, 1980]

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

GEORGE MISKOVSKY, Appellant,	)	
vs.	)	
	)	No. 55,431
WORLD PUBLISHING COMPANY, a corporation; and NEWSPAPER PRINTING CORPORATION, a corporation, Appellees.	)	

PETITION IN ERROR

Appellant, GEORGE MISKOVSKY, alleges and states:

1. This appeal is taken from a decision of the District Court of Creek County, State of Oklahoma, Honorable Charles S. Woodson, Judge of the District Court presiding.

2. The case in the Trial Court was styled: George Miskovsky, plaintiff, vs. World Publishing Company, a corporation; and Newspaper Printing Corporation, a corporation, defendants, No. C-79-8.

3. That on the 2nd day of March, 1979, the appellant herein filed his Petition against the named appellees; and thereafter a series of hearings were held on sundry matters, including but not limited to the appellee's Demurrer to the Petition of the appellant; and, on May 8, 1980, after having heard the oral arguments on the Demurrer and after having had the case under advisement pending receipt of Briefs, and after having received the Briefs and reviewing the file and considering the Briefs, the Court did sustain the appellee's Demurrer to the appellant's Petition and dismissed the case. A true copy of the letter/order of the Trial Court issued and entered by the Court on May 8, 1980, is attached hereto, marked Exhibit "A" and included herein by reference.

4. The Court, in its Dismissal on May 8, 1980, which was made effective on May 9, 1980, did not allow the appellant leave to amend his Petition; and, thereafter a dispute arose between the attorneys for the respective sides as to whether or not the dismissal was with prejudice or without prejudice. As a result, further hearings were scheduled for June 10, 1980, as to the effect of the Trial Court's letter/order of May 8, 1980.

5. As a result of the disagreement between the attorneys, on May 16, 1980, appellant filed a Motion for Rehearing in the Trial Court and also filed his First Amended Petition.

6. Appellant's Motion for Rehearing was scheduled by the Trial Court for June 10, 1980; and, since said date was preemptive of an appeal of the letter/order of May 8, 1980, appellant timely filed a Petition in Error in this Court on June 6, 1980, that being case No. 55355.

7. Thereafter, on June 10, 1980, the Trial Court considered appellant's Motion for Rehearing as Motion for leave to file a First Amended Petition and granted same. This was, in effect, an approval by the Trial Court of appellant's May 16, 1980, filing of his First Amended Petition.

8. Thereafter, and on June 10, 1980, the Trial Court allowed defendants to orally renew their Demurrer previously filed as to appellant's original Petition and summarily sustained the oral Demurrer as to appellant's First Amended Petition and dismissed appellant's case with prejudice stating that the defects of appellant's First Amended Petition "were not capable of being cured by amendment."

9. It is from the Trial Court's summary dismissal of appellant's cause with prejudice on June 10, 1980, that appellant appeals.

10. The points of law urged by appellant as error committed by the Trial Court are as follows:

(a) Error in dismissing appellant's First Amended Petition with prejudice upon sustaining an oral Demurrer and without granting appellant an opportunity to amend; and

(b) Error in sustaining appellee's oral Demurrer to appellant's First Amended Petition.

11. The relief sought by the appellant is an Order from this Court reversing the Trial Court's sustaining of the appellee's oral Demurrer to appellant's First Amended Petition; or, alternatively, an Order directing the Trial Court to allow appellant to further amend his Petition to conform with the Court's objections or directions.

12. A true copy of the Petition in Error is being filed in the Trial Court, by mail on the same date as the filing of this Petition in Error; and, a true copy of the Petition in Error will be mailed this date to counsel for appellee. All parties to this action are represented by counsel. The names of each represented party with the name and address of counsel for each party is as follows:

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[APPENDIX]

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ATTORNEYS FOR APPELLEES

13. A copy of the Designation of Record, filed by mail in the Trial Court pursuant to Rule 1.20(a) of the Rules of Appellate Procedure in civil cases, is attached hereto.

WHEREFORE, appellant prays that the June 10, 1980, Order of the Trial Court sustaining appellee's Demurrer to appellant's First Amended Petition be set aside and that the Trial Court be directed to order the appellee to answer appellant's First Amended Petition and allow appellant to proceed with his cause, or, in the alternative, direct the Trial Court to allow appellant to further amend his Petition in conformity with the objections of the Trial Court as to its alleged defects.

Respectfully submitted,

MISKOVSKY, SULLIVAN,
MISKOVSKY, COOKE & GREGG

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APPENDIX B

[Filed June 30, 1983]

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

GEORGE MISKOVSKY,	)	
Appellant,	)	
vs.	)	
	)	No. 55,431
WORLD PUBLISHING COMPANY, a corporation; and NEWSPAPER PRINTING CORPORATION, a corporation,	)	
Appellees.	)	

PETITION FOR REHEARING

COMES NOW George Miskovsky, Appellant, and respectfully represents to the Court that on the 21st day of June, 1983, a decision was rendered by this Court affirming the sustension of demurrer to petition and amended petition and determining that the petition's defects are not amendable entered by the District Court of Creek County.

Miskovsky seeks rehearing for the following reasons, to-wit:

1. That said decision is in conflict with decisions reached by the United States Supreme Court, and erroneously concludes that defamatory statements of opinion are constitutionally protected under the First Amendment when presented in the context of an editorial or editorial cartoon.

2. That said decision undermines Chief Justice Warren Burger's admonition in *Hutchinson* v. *Proxmire*, 99 U.S. 2675 (1979) that the issue of actual malice should be decided by a jury.

3. That said decision violates Miskovsky's rights under the Oklahoma and United States Constitution to a trial by jury.

[APPENDIX]

4. That said decision erroneously misassigned the burden of proof of falsity. See *Wilson* v. *Scripps-Howard Broadcasting Company*, 642 F.2d 371 (6th Cir. 1981) Cert. granted 102 S.Ct. 500.

5. That said decision violates Miskovsky's rights under the Fourteenth Amendment of the United States Constitution to due process of law and equal protection of the law and that the United States Constitution requires a balancing between the rights of the media defendants and the rights of candidates for public office to freedom of speech and protection of reputation.

6. That said decision erroneously ruled as a matter of law that certain libelous statements are not defamatory, therefore, substituting its own opinion and interpretation for that of a jury or an ordinary reader. See *Memphis Publishing Company* v. *Nichols*, 569 S.W.2d 412 (Tenn. 1978); *Wimmer* v. *The Oklahoma Publishing Company*, 1 P.2d 671 (1931).

7. That said decision and the pattern of decisions in Oklahoma favoring the press threaten to chill the speech of candidates for public office in Oklahoma, thereby violating Miskovsky as well as other candidates' First Amendment rights under the United States Constitution.

8. That said decision erroneously concludes that the United States Constitution supplants state defamation law on the issues of defamatory meaning, opinion, and burden of proof as to truth.

9. That said decision misinterprets the common law and statutory law regarding falsity, defamation, and opinion.

10. That said decision contravenes public policy and the general welfare of the people of Oklahoma.

11. That said decision effectively eliminates public figure libel law in Oklahoma and establishes a tyranny of the press.

Respectfully submitted,

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